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groups, and to afford them the same privilege where possible.⁸ Unions have been permitted to strike in order to obtain better wages,⁹ to force the employer to perform his contracts¹⁰ and to prevent discrimination against union workmen.¹¹

As indicated in the principal case, the public policy which lies behind the Veterans' Act must cause the union contract between the Sinclair Refining Co. and the Oil Workers International Union to give way to the discharged soldier. In *David v. Boston & M. R. R.*,¹² Justice Connor, referring to the Act, decided that the veteran was not to be barred from the right contemplated by the statute because of a contract between the union and employer. In support of his contention, he quotes from *Fishgold v. Sullivan Drydock and Repair Corp.*, ". . . no . . . agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act."¹³ It was also stated that ". . . if the bargaining agreement clashes with the provisions of the Selective Service Act, then the former must yield."¹⁴ These and other cases¹⁵ indicate the strength of the public and social policy supporting the statute. At the present time, when the interest in the returning veteran has not yet completely disappeared, it is quite apparent that this policy carries enough weight to offset that which lies behind the privilege afforded to unions with regard to interference.

W. H. C.

TORTS—RES IPSA LOQUITUR—EXCLUSIVE CONTROL.—Plaintiff, while walking on the sidewalk past the defendant's hotel on V-J Day was struck on the head and injured by an armchair which presumably

⁸ Although the full effect of the Taft-Hartley Act is not yet known, there is some indication that the pendulum has reached the top of its swing and may be returning the unions a step or two towards the *old look*. See Labor Management Relations Act, 1947, 61 STAT. 136, 2 U. S. C. § 251 (Supp. 1947), 29 U. S. C. §§ 141-144, 151-167, 171-182, 185-188, 191-197, 50 U. S. C. App. § 1509.

⁹ *Roddy v. United Mine Workers of America*, 41 Okla. 621, 139 Pac. 126 (1914); *Pierce v. Stablemen's Union, Local No. 8,760*, 156 Cal. 70, 103 Pac. 324 (1909); *Karges Furniture Co. v. Amalgamated W. L. U.* No. 131, 165 Ind. 421, 75 N. E. 877 (1905).

¹⁰ *Spivak v. Wankofsky*, 155 Misc. 530, 278 N. Y. Supp. 562 (Sup. Ct. 1935).

¹¹ *United Chain Theatres v. Philadelphia M. P. M. O.*, 50 F. 2d 189 (E. D. Pa. 1931); *Gill Engraving Co. v. Doerr*, 214 Fed. 111 (S. D. N. Y. 1914).

¹² 71 F. Supp. 342, 347 (D. N. H. 1947).

¹³ 328 U. S. 275, 285, 90 L. ed. 1230, 1240 (1946).

¹⁴ *Olin Industries v. Barnett*, 64 F. Supp. 722, 728 (S. D. Ill. 1946).

¹⁵ *Meehan v. National Supply Co.*, 160 F. 2d 346 (C. C. A. 1st 1947); *Kay v. General Cable Corporation*, 144 F. 2d 653 (C. C. A. 3d 1944); *Lord Mfg. Co. v. Nemenz*, 65 F. Supp. 711 (W. D. Pa. 1946).

came from within the defendant's hotel. The plaintiff relied on the doctrine of *res ipsa loquitur*. Held, judgment for defendant, because the accident was of such a nature that it might have happened despite the fact that defendant was free from negligence and had used ordinary care, for defendant did not have exclusive control over the instrumentality which caused the injury. *Larson v. St. Francis Hotel, et al.*, — Cal. App. 2d —, 188 P. 2d 513 (1948).

The doctrine of *res ipsa loquitur* is applicable when the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident.¹ It can only be invoked where the circumstances of the case unexplained justify the inference of negligence;² as where plaintiff cannot explain what has happened and defendant, because of its exclusive control and superior knowledge, is presumed to be able to explain the cause of the accident.³ *Res ipsa loquitur*, therefore, is inapplicable unless the plaintiff proves as part of his *prima facie* case that the instrumentality causing the injury was under the exclusive control or management of the defendant;⁴ and the doctrine cannot be relied upon where the accident may have been due to causes over which defendant had no control.⁵

The history of the law on this subject is studded with examples and definitions of just what constitutes the "exclusive control" which is necessary for the application of the doctrine. It has been held that the defendant had exclusive control where the plaintiff was injured in the following ways: in defendant's falling elevator;⁶ by the fall of a bolt from defendant's elevated railroad;⁷ by the fall of a vent pipe installed by the defendant;⁸ by the fall of overhead wires being repaired by the defendant;⁹ by plaster falling from the ceiling of

¹ *Benedick v. Potts*, 88 Md. 52, 40 Atl. 1067 (1898).

² *Galbraith v. Busch*, 267 N. Y. 230, 196 N. E. 36 (1935); *Hardie v. Boland Co.*, 205 N. Y. 336, 98 N. E. 661 (1912).

³ *Gerhart v. Southern California Gas Co.*, 56 Cal. App. 2d 425, 132 P. 2d 874 (1942); *Alexander v. Wong Yick*, 25 Cal. App. 2d 265, 77 P. 2d 476 (1938).

⁴ *Olson v. Witthorne & Swan*, 203 Cal. 206, 263 Pac. 518 (1928); *Brown v. Board of Trustees*, 41 Cal. App. 100, 182 Pac. 316 (1919); *Massa v. Nippon Yusen Kaisha*, 264 N. Y. 283, 190 N. E. 641 (1934); *Slater v. Barnes*, 241 N. Y. 284, 149 N. E. 859 (1925); *Dalzell v. New York, N. H. & H. R. R.*, 136 App. Div. 329, 121 N. Y. Supp. 28 (2d Dep't 1910).

⁵ *Hill v. Pacific Gas & Electric Co.*, 22 Cal. App. 788, 136 Pac. 492 (1913); *White v. Spreckels*, 10 Cal. App. 287, 101 Pac. 920 (1909); *Plumb v. Richmond Light & R. R.*, 195 App. Div. 254, 187 N. Y. Supp. 38 (2d Dep't 1921), *aff'd*, 233 N. Y. 285, 135 N. E. 504 (1922).

⁶ *O'Connor v. Mennie*, 169 Cal. 217, 146 Pac. 674 (1915); *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925 (1901); *Kennedy v. McAllister*, 31 App. Div. 453, 52 N. Y. Supp. 714 (4th Dep't 1898).

⁷ *Volkmar v. Manhattan Ry.*, 134 N. Y. 418, 31 N. E. 870 (1892).

⁸ *Michener v. Hutton*, 203 Cal. 604, 265 Pac. 238 (1928).

⁹ *Harvey v. San Diego Electric Ry.*, 92 Cal. App. 487, 268 Pac. 468 (1928).

defendant's vacant apartment;¹⁰ by the collapse of stairs in defendant's stable¹¹ and of a storage tank used in defendant's business;¹² by a feather duster left on the stairs of defendant department store;¹³ where plaintiff, a passenger, was injured by the collision of defendant's trolley car,¹⁴ or by the parting of a hawser while defendant's ship was docking;¹⁵ and where plaintiff, a laborer, was hurt by a falling plank owned by defendant.¹⁶ Generally, the defendant is also deemed to have exclusive control where plaintiff is injured by falling parts of his building such as a chimney,¹⁷ a skylight,¹⁸ a fire escape ladder,¹⁹ a brick,²⁰ or a window sill.²¹

On the other hand, the courts have held that "exclusive control" was lacking in the defendant where plaintiff was injured: when she picked up a broken vase on display in defendant's store;²² by a splinter when he slipped and fell while bowling on defendant's alleys;²³ through failure of defendant landlord to keep a flush handle in plaintiff's apartment in repair;²⁴ by the rebound of one swinging door in defendant's store while she was holding the other door open for another customer;²⁵ while riding as a guest in defendant's automobile when it collided with another car;²⁶ by a planing machine which he was operating in a shop class in defendant's school;²⁷

¹⁰ *Dittiger v. Isal Realty Corporation*, 290 N. Y. 492, 49 N. E. 2d 980 (1943).

¹¹ *Storms v. Lane*, 223 App. Div. 79, 227 N. Y. Supp. 482 (4th Dep't 1928).

¹² *Merino v. Pacific Coast Borax Co.*, 124 Cal. App. 336, 12 P. 2d 458 (1932).

¹³ *Graham v. Joseph H. Bauland Co.*, 97 App. Div. 141, 89 N. Y. Supp. 595 (2d Dep't 1904).

¹⁴ *Plumb v. Richmond Light & R. R.*, 233 N. Y. 285, 135 N. E. 504 (1922); *Loudoun v. Eighth Avenue R. R.*, 162 N. Y. 380, 56 N. E. 988 (1900).

¹⁵ *Soto v. Spring Valley Water Co.*, 39 Cal. App. 187, 178 Pac. 305 (1918).

¹⁶ *Cooper v. Quandt*, 105 Cal. App. 506, 288 Pac. 79 (1930); *Losee v. Paramount Hotel Corporation*, 137 Misc. 530, 242 N. Y. Supp. 608 (Sup. Ct. 1930).

¹⁷ *Travers v. Murray*, 87 App. Div. 552, 84 N. Y. Supp. 558 (2d Dep't 1903).

¹⁸ *Uggla v. Brokaw*, 117 App. Div. 586, 102 N. Y. Supp. 857 (1st Dep't 1907).

¹⁹ *Leonard v. Ireab Holding Corporation*, 270 N. Y. 554, 200 N. E. 315 (1936).

²⁰ *Hughes v. Harbor & Suburban Building & Saving Ass'n*, 131 App. Div. 185, 115 N. Y. Supp. 320 (2d Dep't 1909).

²¹ *Papazian v. Baumgartner*, 49 Misc. 244, 97 N. Y. Supp. 399 (App. Term 1906).

²² *Guttman v. F. W. Woolworth Co.*, 159 Misc. 821, 288 N. Y. Supp. 819 (Mun. Ct. 1936).

²³ *Stelter v. Cordes*, 146 App. Div. 300, 130 N. Y. Supp. 688 (2d Dep't 1911).

²⁴ *Myers v. Campo Corporation*, 26 N. Y. S. 2d 332 (App. Term 1941).

²⁵ *Olson v. Whitthorne & Swan*, 203 Cal. 206, 263 Pac. 518 (1928).

²⁶ *Keller v. Cushman*, 104 Cal. App. 186, 285 Pac. 399 (1930).

²⁷ *Klenzendorf v. Shasta Union H. S. Dist.*, 4 Cal. App. 2d 164, 40 P. 2d 878 (1935).

while engaged in apparently dangerous work on defendant's property;²⁸ by the fall of rigging on defendant's ship which was being used by a stevedore not under the employ of defendant;²⁹ and by the fall of a ceiling in an apartment in defendant's building which was leased to a tenant.³⁰

The instant case falls clearly within the second grouping, for the fact that hotels do not have exclusive control over their furniture is practically a matter of common knowledge; guests have at least partial control.

A. P. D.

WILLS—INCORPORATION BY REFERENCE.—Testatrix, by a will executed in New York in May, 1938, bequeathed to five named distributees "contents of certain envelopes now in my safe deposit box," containing "securities of various kinds"; said envelopes to bear the names of her distributees. *Held*, the bequest is valid as to the envelopes which were found bearing the names of four such persons. *Matter of Le Collen*, 190 Misc. 272, 72 N. Y. S. 2d 467 (Surr. Ct. 1947).

By this decision a New York court has allowed the possible alteration of the extent of a bequest by a simple variation of the contents of certain envelopes either by the testator or anyone else. Indeed, one of the bequests seems to have been eliminated altogether from the will by the fact that no envelope was found to have the name of one particular person so mentioned in the will.

It is a well-settled rule that if a will duly executed and witnessed according to statutory requirements incorporates by reference any document or paper not so executed and witnessed (whether such paper referred to is in the form of a will, codicil, deed, or a mere list or schedule or other written paper or document), such paper, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to, takes effect as a part of the will, and is entitled to probate as such.¹ However, the contrary view has been stated to be unquestionably the law of New York: that an unattested paper which is of a testamentary nature cannot be taken as a part of a will even though referred to by that instrument.²

²⁸ *Brown v. Board of Trustees*, 41 Cal. App. 100, 182 Pac. 316 (1919).

²⁹ *Massa v. Nippon Yusen Kaisha*, 264 N. Y. 283, 190 N. E. 641 (1934).

³⁰ *Slater v. Barnes*, 241 N. Y. 284, 149 N. E. 859 (1925).

¹ *Bemis v. Fletcher*, 251 Mass. 178, 146 N. E. 277 (1925); see also Note, 37 A. L. R. 1476 (1925).

² *Booth v. Baptist Church*, 126 N. Y. 215, 28 N. E. 238 (1891); *Langdon v. Astor's Exrs.*, 16 N. Y. 2, 26 (1857); *Williams v. Freeman*, 83 N. Y. 561, 569 (1881); *Matter of O'Neil*, 91 N. Y. 516, 523 (1883).